Supreme Court, U.S.
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No. 85-985

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

JOSEPH MASIN and EVA MARIA MASIN,

Petitioners,

vs.

VINCENT DRAIN and RUTH DRAIN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January, 1986

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QUESTION PRESENTED

Is it error as a matter of law, in an action alleging housing discrimination under the Federal Fair Housing Act, 42 U.S.C. §3601 et seq., to give a jury instruction that states discrimination must be one "significant factor" to impose liability rather than an instruction that states discrimination must be a "motivating factor" to impose liability (as was approved by this Court in Village of Arlington Heights v. Metropolitan Housing Dev. Corp.)

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No. 85-985

IN THE

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JOSEPH MASIN and EVA MARIA MASIN

Petitioners,

vs.

VINCENT DRAIN and RUTH DRAIN

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respondents Ruth Drain and Vincent Drain respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the California Court of Appeal, Second Appellate District.

STATEMENT OF THE CASE

On April 12, 1978 Respondent Ruth

Drain entered into an exclusive listing contract with Sears Realty to sell her home in Santa Barbara County for $775,000. Respondent Vincent Drain, husband of Respondent Ruth Drain, had no ownership in the home and no legal authority to sell the home.

On July 28, 1978, Petitioners, through their real estate broker, Bob Jones Realty, made an offer to purchase the home for $700,000. The offer was rejected because it was insufficient in price and because the terms of the sale had negative tax consequences for Respondents.

Respondent Ruth Drain was concerned about the tax ramifications of a sale of the home in 1978 and required that any offer to purchase meet the following conditions: (1) an option to purchase would be executed, to be exercised on or after January 1, 1979; (b) option price would

be $100,000 cash, to be applied to the purchase price; (3) escrow would not open prior to January 1, 1979; and (4) all documents would be prepared by attorneys for Ruth Drain and approved by Sears Realty and Ruth Drain's tax attorneys.

On August 24, 1978, Respondent Ruth Drain met with David Boggs who offered to purchase the property for $775,000 and agreed to the terms and conditions as set forth above. Respondent Ruth Drain and Mr. Boggs entered into an oral contract for the sale of the home, and also agreed to reduce the contract to writing on August 29, 1978. The agreement was reduced to writing and the sale was completed.

On August 26, 1978 and August 28, 1978, Bob Jones Realty, on behalf of Petitioners, presented another offer to Respondent Ruth Drain which was rejected because Respondent Ruth Drain had already

accepted Mr. Boggs' offer.

Petitioners thereafter filed suit against Respondents and their real estate agents for, among other things, violating the Federal Fair Housing Act.

Respondents and real estate agents moved for partial summary judgment which was granted. Petitioners appealed that grant to the same District Court of Appeal which, in a separate opinion, affirmed the grant of summary judgment. A copy of said opinions are included herein as Appendix A and B. No review of said decisions was sought.

Thereafter the case proceeded to trial on the balance of the complaint. At trial, the only offers that were tried under the Federal Fair Housing Act were Petitioners' offers of August 26, 1978 and August 28, 1978.

During trial both Ruth Drain and Vincent Drain testified but their testi-

mony was not transcribed and not made a part of the record on appeal.

Petitioners brought up less than a full record on appeal. When Respondents attempted to augment the record on appeal, Petitioners opposed it and the court denied Respondents' motion without prejudice. Thus, the appeal was on less than a full record.

After trial, a nine to three jury verdict was rendered in favor of Respondents.

On appeal, Petitioners claimed error with respect to the trial court's instruction to the jury that "[i]t is a violation of law if national origin is one significant factor in rejecting an offer that meets the terms on which the owner is willing to sell."

The California Court of Appeal for the Second Appellate District upheld the jury verdict. While the District Court

of Appeal found the phrase "a motivating factor" more consistent with this Court's holding in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), and preferable to either "an element" or "one significant factor", it also found that the distinction among the three phrases was not sufficiently significant to assign error to the trial court's choice.

The California Supreme Court denied Petitioners' petition for review.

REASONS TO DENY WRIT

1. THE ISSUE AS PRESENTED TO THIS COURT BY PETITIONERS WAS NOT RAISED IN THE DISTRICT COURT OF APPEAL AND THUS NEVER ADDRESSED

At page 8 of Petitioners' Petition, Petitioners state "[t]he issue which this Court is requested to resolve is whether discrimination need only be 'a factor' in a defendant's refusal to provide housing, or whether it must be a

substantial factor' before liability can be imposed."

On appeal, however, Petitioners contended only that the trial court erroneously instructed the jury when it stated "[i]t is a violation of law if national origin is one significant factor in rejecting an offer that meets the terms on which the owner is willing to sell."

At no time did Petitioners raise the issue as to the use of a "substantial factor" on appeal.

2. PETITIONERS DO NOT PROPERLY REQUEST THIS COURT TO REVIEW THE DECISIONS BELOW

In their amended complaint in the cause of action dealing with housing discrimination, Petitioners alleged discrimination with respect to their offers to purchase of August 26 and 28, 1978.

During trial on this cause of action, the offers tried as to the alleged basis of liability were the offers of August

26 and 28, 1978.

Yet, according to Petitioners' Statement of the Case, Petitioners have shifted to a different offer which they never claimed was rejected on grounds of discrimination and thus was not even tried at the trial court level.

This different offer only became an issue in the District Court of Appeal after Respondents had filed their opposition brief. This different offer did not meet the terms required by Respondent Ruth Drain and was never the subject of a claim of discrimination under the Federal Fair Housing Act.

Thus, the petition seeks a review of a rejected offer which was never alleged in the complaint nor tried in the trial court but was addressed by the appellate decision.

3. THE DISTRICT COURT OF APPEAL DECISION IS NOT IN CONFLICT WITH THE PRINCIPLES SET FORTH BY THIS COURT IN ARLINGTON HEIGHTS

In Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), a real estate developer sued a municipality because of its alleged refusal to rezone land on which the developer intended to build low and moderate income housing. The developer alleged that the municipality's conduct was racially discriminatory in violation of the Fair Housing Act. This Court noted that when there is proof that a discriminatory purpose has been a motivating factor in the decision, judicial deference to legislative decisions is inappropriate.

Petitioners allege that the District Court of Appeals' countenance of "significant factor" in place of "motivating factor" as used by this Court

renders the District Court of Appeal decision in conflict with this Court's decision in Arlington Heights.

Since there are no relevant reported decisions which specifically define the words "factor," "motivating," "significant," or "substantial," reference is made to Webster's New Collegiate Dictionary for the meaning of these words.

"Factor" is defined as ". . . 2 a: something that actively contributes to the production of a result: ingredient . . . ." "Active is defined as ". . . 1 : characterized by action rather than by contemplation or speculation . . . ." "Contribute" is defined as ". . . b: to play a significant part in bringing about an end or result . . . ."

"Significant" is defined as ". . . 3 a: having or likely to have influence or effect: important, weighty b :

probably caused by something other than mere chance . . . ."

"Motive" is defined as ". . . 1 : something (as a need or desire) that causes a person to act . . . ."

"Substantial" is defined as ". . . 1 a : consisting of or relating to substance . . . c : important, essential . . . ." (Emphasis added.)

As can be seen from the definitions of these words, a common theme of cause and effect runs through these words. Likewise, this common theme is present when the words are combined in the phrases "motivating factor", "significant factor" and "substantial factor."

There does not appear to be a clear distinction or definitional difference between "motivating factor" as used by this Court and "significant factor" as used by the District Court of Appeal in this case or even "sub-

stantial factor" referred to by Petitioners.

Petitioners' alleged conflict with this Court's decision in Arlington Heights is not one of law but of semantics.

4. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEAL

Petitioners assert in their Petition that there is a conflict amongst the Circuit Courts of Appeal because the Fifth Circuit Court of Appeal is the only circuit which has adopted "the 'substantial factor' test."

Petitioners further assert that this standard was first enunciated in United States v. Pelzer Realty Co., Inc., 484 F.2d 438 (5th Cir. 1973, cert. denied, 416 U.S. 936 (1974).

The standard described by the court in Pelzer was the significant factor test

and not the substantial factor test. Petitioners, by their own misstatements, appear to be creating conflicts that do not exist.

Moreover, Petitioners obfuscate the issue in this case when in footnote 2 in their Petition they submit that "'a motivating factor' and 'a factor' are in essence the same standard, and that they each represent a standard quite different from that of 'a substantial factor.'"

As noted by the District Court of Appeal in this case:

> "Cases involving the Fair Housing Act, . . . are not consistent in their terminology. Many Fifth Circuit cases continue to use 'a significant factor' or 'one significant factor', e.g., Woods-Drake v. Lundy (1982) 667 F.2d 1198 which lists other cases using that phrase. Other courts use 'a motivating factor' or 'competing consideration', e.g. Atkins v. Robinson (DCA Va. 1982) 545 F.Supp. 852; United States v. City of Parma, Ohio (1981) 661 F.2d 562; United

"States v. City of Birmingham, Mich. (1982) 538 F.Supp. 819. Still others employ the terms 'a part', 'any part', 'a consideration', 'some role', or 'an element', e.g., Bishop v. Pecsok (Ohio 1976) 431 F. Supp. 34; Jordan v. Dellway Villa of Tenn., Ltd. (6th Cir. 1981) 661 F.2d 588; United States v. Mitchell (5th Cir. 1978) 580 F.2d 789, 791; Zuch v. Hussey, supra, 394 F.Supp. 1028; Shaw v. Cassar (E.D. Mich. 1983) 558 F.Supp. 303.

A close reading of the cases cited reveals that almost all hark back to Smith v. Sol D. Adler Realty Company, supra, or more recently to Arlington Heights, supra. Moreover, the persuasive theme in all the cases (even those in the suspect Fifth Circuit) is that race is an impermissible consideration in a real estate transaction (Moore v. Townsend (7th Cir. 1975) 525 F.2d 482, 485) and that race need not be the sole motivating factor in a denial that has discriminatory effect in order for plaintiff to succeed in a claim under the Fair Housing Act (Robinson v. 12 Lofts Realty, Inc. (2nd Cir. N.Y. 1979) 610 F.2d 1032, 1042). A denial violates the statute if race is even one of the motivating factors. (Ibid.)"

5. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE BECAUSE THIS CASE WAS DECIDED ON A PARTIAL RECORD; FURTHER, CALIFORNIA HAS ITS OWN HOUSING DISCRIMINATION ACT

Petitioners argue that this case presents an important question of national significance in the area of federal civil rights law.

Yet Petitioners fail to point out that this case was decided in the District Court of Appeal on a partial record only, thereby significantly diminishing this case's importance and significance. One of the items that was not included in the record on appeal was the trial testimony of Respondents Ruth Drain and Vincent Drain.

Further, California has its own housing discrimination act which states in pertinent part:

"It shall be unlawful:

(a) For the owner of any

"housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such person.

(b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, marital status, national origin, or ancestry of any person seeking to purchase, rent or lease any housing accommodation . . . ."

California Government Code section 12955

42 U.S.C. §3610(d) of the Federal Fair Housing Act provides, in pertinent part:

". . . no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this sub-chapter. . . . ."

Since California Government Code §12955(a) and (b) is substantially equivalent to 42 U.S.C. §3604(a), under 42 U.S.C. §3610(d), it is questionable whether this case was properly brought under the Federal Fair Housing Act. See, e.g., McLaurin v. Brusturis, (1970) 320 F.Supp. 190 (D.C. Wis.); Colon v. Tompkins Square Neighbors, Inc., (1968) 289 F.Supp. 104 (D.C.N.Y.); Denny v. Hutchinson, (1981) 649 F.2d 816 (C.A. Col.).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS R. SHERIDAN
Attorney for Respondents

APPENDICES

149 Cal.App.3d 484

BOB JONES doing
business as BOB
JONES REALTY,
PLAINTIFF and
RESPONDENT

v.

VINCENT DRAIN and
RUTH DRAIN, DEFENDANTS
and APPELLANTS.

Civ. 67286

Court of Appeal,
Second District
Division 6

December 2, 1983

Hearing Denied
February 16, 1984

Appendix A

FACTS

STONE, Presiding Justice.

The appellants entered into an exclusive listing contract with Sears Realty for the sale of their home in Santa Barbara County. Sears Realty entered into an oral contract with respondent, Bob Jones Realty, in which the respondent agreed to act as a cooperative broker to find a purchaser for the Drain property. Bob Jones located a potential purchaser that submitted an offer on July 28, 1978. This offer was rejected because of potential adverse tax consequences for the Drains.

On August 24, 1978, the appellants received an oral offer from David Boggs which was accepted. The parties agreed to meet August 29, 1978, to reduce the agreement to writing. In the meantime, the Drains received written offers from a purchaser obtained by Bob Jones Realty.

These offers were rejected because the Drains had previously agreed to sell the property to Boggs.

Bob Jones Realty and its purchaser, the Masins, filed suit against the Drains and Sears Realty alleging: (1) Housing Discrimination, (2) Misrepresentation, (3) Breach of Contract, and (4) Declaratory Relief. The first two causes of action were decided at trial in favor of Sears Realty and the appellants, the Drains. The trial court granted summary judgment on the third and fourth causes of action in favor of the appellants and Sears Realty.

The fourth cause of action was appealed to this court and the ruling of the trial court was affirmed. (See Masin v. Drain, 150 Cal.App.3d 714, 198 Cal.Rptr. 367.) However, Vincent and Ruth Drain have brought this appeal contesting the trial court's order

taxing the attorney's fees request from its memorandum of costs.

ANALYSIS

The sole issue on appeal is whether or not the trial court correctly denied the appellants' claim for attorneys' fees.

The appellants argue that Civil Code section 1717 provides authority for the attorney's fees award. That section states in pertinent part: "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of that contract, shall be awarded eitner to one of the parties or to the prevailing party, then the party who is determined to be the prevailing party, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and

necessary disbursements." It is the appellants' contention that since the respondent brought suit against the Drains for breach of contract which contained an attorney's fee provision, that the appellants should be able to recover their legal fees as the prevailing party. The respondent asserts that the Drains should not be allowed to recover their costs because the trial court found, as a matter of law, that no contract existed between Bob Jones Realty and the Drains.

The issue by the respondent was considered in the case of Babcock v. Omansky (1973) 31 Cal.App.3d 625, 107 Cal.Rptr. 512. In that case a wife was sued for breach of four promissory notes executed by her husband. The court held that the wife was not a party to the notes and that the breach of contract action brought by the plaintiff was

without merit. The wife, as the successful party to the litigation, was granted attorney's fees and costs pursuant to Civil Code section 1717 because the plaintiff, in the underlying action, had sought to recover attorney's fees under the provisions of the promissory note contract. The court in ruling for the wife stated: "As the language of the statute expressly indicates, a party need not be a signatory to the contract in order to recover attorney's fees as the prevailing party--as such prevailing party he becomes entitled to fees 'whether he is the party specificed in the contract or not.'"

This issue was also considered in Care Construction, Inc. v. Century Convalescent Centers (1976) 54 Cal.App. 3d 701, 126 Cal.Rptr. 761. In Care the defendant was sued for breach of a lease contract and successfully defended its

case on the theory that the laws was invalid. The court in awarding the defendant attorney's fees stated: "To summarize, we hold that where there is an action on a purported lease which contains a provision for attorney's fees for the lessor that the lessee is entitled to attorney's fees under Civil Code, section 1717, if he succeeds in defending on the theory that there was no valid or enforceable lease."

The seminal case dealing with attorney's fees on contract causes of action is Reynolds Metal Co. v. Alperson (1979) 25 Cal.3d 124, 158 Cal.Rptr. 1, 599 P.2d 83. In that case the California Supreme Court held that "Section 1717 was enacted to establish mutuality of remedy where a contractual provisions makes recovery of attorney's fees available for only one party." (supra, p. 128, 158 Cal.Rptr. 1, 599 P.2d

83.) The court went on to state, "Its purposes require section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (supra, p. 128, 158 Cal.Rptr. 1, 599 P. 2d 83.) (Emphasis added.)

The critical issue to be addressed in this case is whether or not the plaintiff, Bob Jones Realty, clearly would have been entitled to attorney's fees had it prevailed in enforcing the contract against the defendants Drains.

In considering the question of the clarity of the entitlement to attorney's fees we must decide whether this issue is to be resolved based upon the pleadings or based upon the evidence. We believe that the issue must turn on the

pleadings.

The respondent's third cause of action against the appellants was for breach of a written contract containing an attorney's fees provision. The appellants prevailed on this cause of action when their motion for summary judgment was granted and the respondent failed to appeal the ruling. Consequently, the appellants satisfied all of the elements set forth in Civil Code section 1717 for the recovery of attorney's fees.

The respondent argues there was no possibility that it could have recovered attorney's fees against the appellants because the respondent was not a party to or a beneficiary of the contract. This argument is disingenuous to say the least. The essence of the respondent's position is that its cause of action was so devoid of merit that there was

no possibility that it ever could have prevailed. As a consequence, the respondent contends that there was no likelihood that it could ever obtain a judgment for breach of contract and as a result, it could never obtain an award of attorney's fees against the appellants. Given this scenario, the respondent asserts that the mutuality of attorney's fees provision of Civil Code section 1717 should not be involved.

The respondent cites several cases which it asserts supports its position. The first of these is Canal-Randolph Anaheim, Inc. v. Wilkoski (1978) 78 Cal. App.3d 477, 144 Cal.Rptr. 474. In that case the court stated: "Moreover, even where a contractual provision for recovery of attorney fees is one-sided and Civil Code section 1717 applies, recovery of and liability for attorney fees

is restricted to parties to the contract. (Arnold v. Browne (1972) 27 Cal.App.3d 386, 398, 103 Cal.Rptr 775; Boliver v. Surety Co. (1977) 72 Cal.App.3d Supp. 22 at pp. 28-29, 140 Cal.Rptr. 259.) To the extent the decision in Babcock v. Omansky (1973) 31 Cal.App.3d 625, 107 Cal.Rptr. 512, indicates the contrary, it is incorrect . . ." (Canal-Randolph Anaheim, Inc. v. Wilkoski, supra, 78 Cal.App.3d p. 485, 144 Cal.Rptr. 474.)

The respondent's reliance upon Canal-Randolph is misplaced. The Canal-Randolph court relied exclusively upon the Arnold and Boliver cases to support its proposition that one must be a party to the contract to recover attorney's fees under Civil Code section 1717. The Arnold case was expressly disapproved by the California Supreme Court in Reynolds Metals Co. v. Alperson, supra, 25 Cal.3d

124, 129, 158 Cal.Rptr. 1, 599 P.2d 83. Furthermore, the Reynolds court also endorsed the holding of Babcock v. Omansky [Citation.] which the Canal-Randolph court so vigorously disapproved. The language of Reynolds clearly indicates that the reasoning of Babcock is the correct analysis. "Had plaintiff prevailed on its cause of action claiming defendants were in fact the alter egos of the corporation [Citation.], defendants would have been liable on the notes. Since they would have been liable for attorney's fees pursuant to the fees provision had plaintiffs prevailed, they may recover attorney's fees pursuant to section 1717 now that they have prevailed." (Reynolds Metals Co. v. Alperson, supra, 25 Cal.3d 124, 129, 158 Cal.Rptr. 1, 599 P.2d 83.)

The respondent relies heavily upon

Boliver v. Surety Co., supra, 72 Cal.App.3d Supp. at p. 22, 140 Cal.Rptr. 259. This case rejects the Babcock analysis in favor of Arnold v. Browne, supra, 27 Cal.App.3d 386, 103 Cal.Rptr. 775. Given the Supreme Court's disapproval of Arnold and the adoption of Babcock in the Reynolds case, the Boliver holding provides little, if any, support for the respondent.

Star Pacific Investment, Inc. v. Oro Hills Ranch, Inc. (1981) 121 Cal.App.3d 447, 176 Cal.Rptr. 546 was also cited by respondent. The court in that case incorrectly adopted the position that recovery of attorney's fees under Civil Code section 1717 must be limited to the parties to the contract. This holding is in direct contradiction to the Babcock and Reynolds cases.

The respondent also places a great

deal of reliance on Saucedo v. Mercury Savings & Loan (1980) 111 Cal.App.3d 309, 168 Cal.Rptr 552. The Saucedo court erroneously attempts to draw a distinction between parties to the contract and parties to the litigation based on the contract. Nevertheless, the court in Saucedo reiterated an equitable estoppel theory first set forth in Pas v. Hill (1978) 87 Cal.App.3d 521, 151 Cal.Rptr. 98, which runs completely contrary to the respondent's position. The court stated, in concurring that the result in the Babcock case was correct, that "[t]he plaintiffs having alleged and attempted to prove the defendant wife was a party to the notes as a joint venturer and that she was liable under the notes' attorney fee provisions and having caused defendant wife to defend against such liability,

were estopped to deny defendant wife was a party to the contract for the remedial purposes of Civil Code section 1717." (Pas v. Hill, supra, 87 Cal.App.3d at 535-536, 151 Cal.Rptr. 98.)

What the respondent ignores is that had it prevailed in its cause of action against the appellants it would have been entitled to attorney's fees. This issue became somewhat obscured in the trial court because of the fact that the respondent's case was so completely without merit. However, even though the respondent possessed no evidence to support its cause of action it was capable of alleging sufficient facts in its pleadings to force the appellants to wage a defense.

The courts have consistently held that the award of Civil Code section 1717 contractual attorney's fees is to be

governed by equitable principles. (International Industries, Inc. v. Olen (1978) 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031; Lewis v. Alpha Beta Co. (1983) 141 Cal.App.3d 29, 189 Cal.Rptr. 840.) We believe that it is extraordinarily inequitable to deny a party who successfully defends an action on a contract, which claims attorney's fees and costs simply because the party initiating the case has filed a frivolous lawsuit. As a consequence, we find that a prevailing defendant sued for breach of contract containing an attorney's fees provision and having had to defend the contract cause of action, is entitled to recover its own attorney's fees and costs therefor, even though the trial court finds no contract existed.

The judgment of the trial court in regards to attorney's fees is reversed

and remanded for a hearing to determine the appellants' attorneys' fees and costs.

ABBE and GILBERT, JJ., concur.

150 Cal.App.3d 714

JOSEPH MASIN and
EVA MARIA MASIN,
husband and wife,
et al., Plaintiffs
and Appellants,

v.

VINCENT DRAIN and
RUTH DRAIN, husband
and wife, et al.,
Defendants and
Respondents.

Civ. 67347

Court of Appeal,
Second District,
Division 6

January 10, 1984

Hearing Denied
April 18, 1984

APPENDIX B

STONE, Presiding Justice.

Bob Jones Realty, the plaintiff below and appellant herein appeals from an order of the Santa Barbara Superior Court granting respondent Sears Realty's motion for summary judgment.

FACTS

This case involves Bob Jones Realty's attempt to obtain a portion of the commission paid to Sears Realty for the sale of a home in Santa Barbara County. The appellant contends that it is entitled to this commission because it produced a ready, willing and able purchaser prior to the date on which the property was sold.

On April 12, 1978, Ruth Drain entered into an exclusive listing contract with the respondent, Sears Realty, to sell her home. Appellant, Bob Jones Realty, worked as a cooperative broker with Sears Realty and showed the Drain

property to the Masins, who were German nationals. The Masins liked the Drain home and submitted an offer on July 28, 1978, which was rejected because the terms offered had negative tax consequences for the seller.

The Drains were concerned about the tax ramifications of selling their home in 1978 and therefore required that any offer to purchase the property meet the following conditions: (1) An option to purchase would be executed, to be exercised on or after January 1, 1979; (2) Option price would be one hundred thousand dollars ($100,000.00) cash, to be applied to purchase price; (3) Escrow would not open prior to January 1, 1979; and (4) All documents would be prepared by attorneys for Mrs. Drain and approved by Sears Realty and Mrs. Drain's tax attorneys.

On August 24, 1978, the Drains met

with David Boggs who offered to purchase the property and agreed to the terms and conditions set forth above. The Drains and Boggs entered into an oral option contract for the sale of their property and agreed to reduce the contract to writing on August 26, 1978. On August 26, 1978, agents for Bob Jones Realty delivered a written offer to purchase the Drain property to Sears Realty. This offer was rejected because the Drains had already accepted the Boggs' offer. A virtually identical offer was personally delivered to Vince Drain on August 28, 1978. This offer was also rejected.

The appellant and the Masins filed suit against Sears Realty and the Drains alleging: (1) Housing Discrimination, (2) Fraudulent Misrepresentation, (3) Breach of Contract, and (4) Declaratory Relief. A motion for summary judgment was filed by Sears Realty on the fourth

cause of action, which was granted. Bob Jones Realty appeals the trial court's ruling on this issue.

The declaratory relief cause of action required that the trial court determine Bob Jones Realty's rights to the commission paid to Sears Realty pursuant to the listing contract. The respondent, Sears Realty, filed a motion for summary judgment against this cause of action based upon two theories. First, it contended that the Drains had entered into an oral option contract prior to receiving the Masin offers. Secondly, it argued that the offers were invalid and unenforceable because of their failure to comply with the statute of frauds. The trial court did not specify which theory it accepted in granting the summary judgment. The appellant examines both issues on appeal.

THE AUGUST 26 and 28 OFFERS

The appellant contends that it is entitled to share in the commission for the sale of the Drain property because it produced a ready, willing and able buyer prior to the creation of the option contract with David Boggs. The appellant does acknowledge that, "had the Drains sold the property to Boggs prior to the written offers to purchase by Eva Masin on August 26 and 28, 1978, Bob Jones Realty would not be entitled to any portion of the broker's commission."

In analyzing the trial court's actions in granting a summary judgment motion we must review all of the documents attached to the moving papers. (Jacobs v. Retail Clerks Union, Local No. 1222 (1975) 49 Cal.App.3d 959, 123 Cal.Rptr. 309). The respondents' motion contained declarations of Ruth Drain, Arthur Bromfield and Ann Little. Mrs.

Drain's declaration specifically asserts the existence of an oral contract with Boggs on August 24, 1978. The declarations of both Bromfield and Little, who are agents for Sears Realty, indicate that they were informed on August 25, 1978, that an oral option contract for the sale of the Drain property had been made.

The fact that the option contract was oral does not invalidate the agreement. The statute of frauds, set forth in Civil Code section 1624, has not been interpreted as making such agreement null and void. It is the general rule that a contract falling within the operation of the statute, but made in contravention thereof, is not invalid in the sense that it is void. It is merely voidable. The statute is said to relate to the remedy only and not to affect the validity of the oral contract. (Offeman

v. Robertson-Cole Studios, Inc. (1926) 80 Cal.App. 1, 12, 251 P. 830; Warder v. Hutchison (1924) 69 Cal.App. 291, 295, 231 P. 563; Durbin v [illegible]man (1920) 50 Cal.App. 377, 379, 195 P. 274; O'Brien v. O'Brien (1925) 197 Cal. 577, 586, 241 P. 861.)

When affidavits in support of a motion for summary judgment state facts which would sustain a judgment and counter affidavits do not contradict them, summary judgment is proper. (City of Los Angeles v. City of Artesia (1977) 73 Cal.App.3d 450, 140 Cal.Rptr. 864). The affidavits submitted by the appellant in opposition to the summary judgment motion contained only the declaration of Paul O'Keeffe and Lawrence Linn. These brokers declared that the agents for the Drains continued to negotiate the sale of the property on August 26, 1978.

The appellant contends that Sears

Realty's efforts in continuing to facilitate a sale to the Masins raises the inference that an option contract for the sale of the property was not actually created on August 24, 1978. The appellant argues that the existence of this inference raises a triable issue of fact. If a material factual issue was before the court at the time the summary judgment was granted reversible error was committed. (Fosgate v. Gonzales (1980) 107 Cal.App.3d 951, 166 Cal.Rptr. 233).

We do not believe that the appellant has been successful in demonstrating the existence of a triable issue of fact. Although the appellant has admitted affidavits indicating that Sears Realty continued to negotiate a sale of the Drain property on August 26, 1978, this evidence does not refute Ruth Drain's

declaration that an oral option contract was created on August 24, 1978. The appellant did not demonstrate that the Drains had any knowledge of the acts of Sears Realty. Furthermore, the appellants clearly have not presented evidence that Sears Realty was instructed by the Drains to continue negotiations.

Therefore, even when we accept the facts alleged in the appellant's affidavits as being true, as required by Blaustein v. Burton (1970) 9 Cal.App.3d 161, 88 Cal.Rptr. 319, the most the appellant can prove is that Sears Realty continued to act independently after the August 24, 1978 oral option contract was created. This fact, in and of itself, is insufficient to rebut the respondent's evidence that the property was sold August 24, 1978. Therefore, we conclude that the Drain property was effectively removed from the market

prior to the receipt of the August 26 and 28 offers from Bob Jones Realty's purchasers, the Masins. In light of this fact the appellant, Bob Jones Realty could not be entitled to any commission. As a consequence, the trial court correctly granted the motion for summary judgment.

The judgment of the lower court is affirmed.

ABBE and GILBERT, JJ., concur.

Hearing denied; MOSK, J. dissenting.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, January 9, 1986, I served the within RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in re. "Joseph Masin and Eva Maria Masin vs. Vincent Drain and Ruth Drain" in the U.S. Supreme Court, October Term, 1985, No. 85-985,

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

FRANCES E. KOMOROSKE
831 State Street
Santa Barbara, CA 93101

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on January 9, 1986
at Los Angeles, California.

Kathlee Kattenbach